IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MICHELE A. ROHALY, Appellant, v. RAINBOW PLAYGROUND DEPOT, INC., Respondent.	)	No. 56478-1-I UNPUBLISHED OPINION FILED: **August 28, 2006**

SCHINDLER, A.C.J. ─ Rainbow Play Systems Pacific Northwest, LLC, (PNW) fired Michele Rohaly because she refused to comply with the dress code policy and wear a navy blue blazer. Rohaly filed a lawsuit against PNW's successor corporations, Rainbow Playground Depot, Inc., and Rainbow Play Systems, Inc., alleging sex discrimination and retaliation under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and requesting reinstatement and damages. The trial court ruled as a matter of law that PNW's dress code policy was not unduly burdensome on female employees and dismissed Rohaly's Title VII and WLAD sex discrimination claims on summary judgment. The court also ruled Rohaly did not establish Playground Depot

was liable as a successor corporation under state law and refused to apply the federal doctrine of remedial successor liability to her WLAD claim.[1] We conclude there are genuine issues of material fact about whether the dress code policy was discriminatory and imposed an unequal burden on women. We reverse the trial court's summary judgment dismissal of Rohaly's sex discrimination claim under Title VII and remand for trial. We affirm the trial court's decision to not apply the federal doctrine of remedial successor liability to the WLAD claim.

FACTS

From June 1994 until August 2002, Rainbow Play Systems Pacific Northwest, LLC (PNW) was an authorized dealer and distributor of Rainbow Play Systems, Inc. (Rainbow) playground equipment.[2] Rainbow is a Minnesota Corporation with headquarters in South Dakota. PNW operated a number of retail stores in Oregon and Washington. Rob West and Bryan Trenary were the owners of PNW.[3] Bryan Trenary also acted as the president for PNW.

In spring 1996, PNW hired Michele Rohaly to work as a receptionist at its retail outlet store in Tigard, Oregon. In April 1999, Rohaly transferred to PNW's Kirkland, Washington, store to work in sales. At the time, PNW had an informal unwritten dress policy. Though there are different versions of what employees were expected to wear, it appears employees could wear t-shirts or denim shirts with the "Rainbow" logo and other casual clothing.

[1] After a jury trial on Rohaly's retaliation claim, the jury found in favor of Playground Depot.

[2] Pacific Northwest also sold other outdoor equipment and supplies.

[3] Trenary owned two-thirds of the company and West owned one-third of the company.

In September or October 2001, PNW hired Donna Leonard, Trenary's mother, as the sales manager for the company.[4] PNW hired Leonard to train the sales personnel and to establish a more professional image for company employees.

In January 2002, Leonard implemented a new dress policy. All employees had to purchase and wear khaki pants. Men were required to purchase and wear "Rainbow" denim shirts and women were required to purchase and wear a navy blazer over a polo shirt.[5] When asked about the new dress policy, Leonard testified, "We wore – we were able to wear polo shirts, so a lot of them already had polo shirts. They already had the polo shirt and—and they already had khaki pants. That was already the dress code without it being in print, okay? So they already had that. The only thing that was implemented that was new really and spelled out was the blue blazer."

Each time Leonard visited the Kirkland store in January, she asked Rohaly when she was going to start wearing a navy blazer. Rohaly explained that she could not afford to purchase a blazer at that time.

On January 20, 2002, Rohaly and Leonard met to discuss Rohaly's repeated tardiness and whether Rohaly could continue to bring her daughter to work. Leonard told Rohaly that she instructed the bookkeeper to deduct $100 from Rohaly's paycheck if she was late to work again. At the end of the meeting, Leonard also asked Rohaly when she planned to start wearing the blazer and suggested places to purchase one.

On February 6, 2002, Rohaly came to work wearing a "Rainbow" denim shirt and

[4] Leonard also worked as the regional manager of the southern Washington and Oregon stores.

[5] Rohaly believed Leonard's revised, unwritten dress code did not prohibit women from wearing Rainbow's denim shirts.

khaki pants. Leonard gave Rohaly her blue blazer and insisted she wear it. Rohaly agreed to wear Leonard's blazer that day, but said that she "had spoken to [Trenary] about the blazer and that he had told [her] that what [she] was wearing was fine."

At the end of the day, Trenary met with Rohaly, Leonard, and Kelly Rohaly, Rohaly's brother who also worked at PNW. Trenary talked to Rohaly about the company's goal of presenting a more professional image and the need for a dress policy. Trenary asked Leonard what type of blazer she wanted Rohaly to wear and suggested that Leonard prepare an employee memorandum about the blazer. Rohaly expressed concerns that wearing a blazer without the company logo would adversely affect her sales commission opportunities. At the end of the meeting, Leonard asked Rohaly if she intended to wear a blazer. Rohaly said she did not. Trenary tried to talk Rohaly out of her position. When Rohaly still refused to agree to wear a blazer, Trenary fired her.

A week after Rohaly's employment terminated, PNW issued a written dress policy. The February 13, 2002, written policy required men to purchase and wear the Rainbow blue denim shirts and khaki pants, and women to purchase khaki pants and a navy blue blazer to wear over a navy or white polo shirt, turtleneck, or shell. The policy gave the employees until February 20, 2002, to comply with the dress code. According to Trenary, PNW issued the written dress code policy "as a result of the issue with Michele."

By the summer of 2002, PNW was struggling financially. It had outstanding orders and deposits from customers for playground equipment in excess of $400,000,

but did not have the inventory to fill the orders. Because PNW owed Rainbow over $170,000, Rainbow would no longer ship playground equipment to PNW. On August 19, 2002, PNW gave Rainbow a security interest in some of its assets in exchange for more time to pay off its debt. PNW also agreed to enter into a management agreement with Rainbow Playground Depot, Inc., an Oregon corporation. Playground Depot agreed to assume management of six of PNW's retail stores and responsibility for PNW's outstanding orders and liabilities. That same month, Playground Depot hired a number of PNW employees, including Bryan Trenary.[6] In September 2002, to avoid foreclosure, PNW voluntarily surrendered the security interest to Rainbow. Rainbow then assigned the assets to Playground Depot, which continued to manage the PNW retail stores acquired by Rainbow.

Rohaly filed a sex discrimination complaint with the Equal Employment Opportunity Commission against "Rainbow Play Systems." In December 2002, Rohaly filed a lawsuit against Rainbow Playground Depot, Inc. and Rainbow Play Systems, Inc., as successors of PNW. Rohaly alleged sex discrimination and retaliation in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and requested reinstatement and damages.

Playground Depot and Rainbow moved for summary judgment, arguing they were not liable as successors of PNW and PNW's dress policy was not discriminatory. Rohaly filed a cross motion for summary judgment. The trial court granted Playground

[6] Trenary filed for bankruptcy in 2003.

Depot and Rainbow's summary judgment motion, dismissing all of Rohaly's claims except the Title VII retaliation claim. The trial court ruled that the dress code policy was not discriminatory and did not violate WLAD or Title VII. The court also ruled Rohaly did not establish Playground Depot was liable under state law as a successor corporation, and the federal doctrine remedial successor liability did not apply to Rohaly's WLAD claim. A trial on the retaliation claim resulted in a jury verdict in favor of Playground Depot. Rohaly appeals the trial court's summary judgment dismissal of her sex discrimination claims against Playground Depot.[7] Rohaly also challenges the trial court's refusal to apply the federal doctrine of successor liability to her WLAD sex discrimination claim.[8]

ANALYSIS

Dress Code Policy

Rohaly contends the trial court erred in ruling as a matter of law that PNW's dress code policy did not violate Title VII and WLAD. We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court. Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002); Korslund v. Dyncorp Tri-Cities Servs., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is proper if the pleadings, affidavits, depositions and admissions show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rene, 305 F.3d at 1064 (citing Fed. R. Civ. P. 56(c)); Wash. CR 56(c); Korslund, 156 Wn.2d

[7] Rainbow is not a party to this appeal.

[8] Northwest Women's Law Center filed an amicus curiae brief and participated at oral argument on Rohaly's behalf.

at 177. "A material fact is one upon which the outcome of the litigation depends, in whole or in part." Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Only when reasonable minds could reach but one conclusion on the evidence, should the court grant summary judgment. Smith v. Safeco Ins. Co., 150 Wn.2d 478, 485, 78 P.2d 1274 (2003). Facts and reasonable inferences must be viewed in a light most favorable to the nonmoving party. Rene, 305 F.3d at 1064; Korslund, 156 Wn.2d at 177. Where competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Hudesman v. Foley, 73 Wn.2d 880, 889, 441 P.2d 532 (1968); Kuyper v. State Dep't of Wildlife, 79 Wn. App. 732, 739, 904 P.2d 793 (1995). Generally, summary judgment is rarely granted in employment discrimination cases. Johnson v. Dep't of Social & Health Servs., 80 Wn. App. 212, 226, 907 P.2d 1223 (1996).

Both Title VII and WLAD prohibit employment discrimination based on sex. Title VII, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Similarly, WLAD, RCW 49.60.180, provides in pertinent part:

> It is an unfair practice for any employer:
> . . . .
> (2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person.
> (3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental,

> or physical disability or the use of a trained dog guide or service animal by a disabled person.

WLAD is patterned after Title VII, and Washington courts rely on federal decisions interpreting Title VII to decide issues under WLAD. See, e.g., Oliver v. Pac. Northwest Bell Tel. Co., 106 Wn.2d 675, 678, 724 P.2d 1003 (1986); Haubry v. Snow, 106 Wn. App. 666, 674 n.7, 31 P.3d 1186 (2001).

Rohaly alleges PNW's dress policy violated Title VII and WLAD under a disparate treatment theory. Rohaly contends the policy treats women less favorably than men because of their sex and therefore constitutes disparate treatment.[9]

Appearance standards and dress policies are facially discriminatory when they only apply to one sex or when they impose unequal burdens on only one sex.[10] See Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979) (requiring only women to wear uniforms is facially discriminatory); O'Donnell v. Burlington Coat Factory Warehouse, Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (requiring only women to wear uniforms is facially discriminatory); Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 608 (9th Cir. 1982) (imposing weight requirements only on women is facially discriminatory); Frank, 216 F.3d at 853-54

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[9] Rohaly does not allege disparate impact. See Frank v. United Airlines, Inc., 216 F.3d 845, 853 (9th Cir. 2000) (explaining the two theories of employment gender discrimination include disparate treatment and disparate impact).

[10] Some federal courts have limited findings of discrimination in appearance standards to disparate treatment based on immutable characteristics and fundamental rights. See, e.g., Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756 (9th Cir. 1977); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1090 (5th Cir. 1975); Baker v. California Land Title Co., 507 F.2d 895, 898 (9th Cir. 1974). But this standard is outdated and several courts have found disparate treatment in the absence of an immutable characteristic or fundamental right. Price Waterhouse v. Hopkins, 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); Frank, 216 F.3d at 854-55; Gerdom, 692 F.2d at 605-06; Knott v. Mo. P.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975).

(imposing stricter weight requirements on women than men is facially discriminatory).

But, because the appearance of a company's employees can contribute to the company's image and success, courts have upheld sex-differentiated appearance standards if standards apply to both sexes and do not impose unequal burdens on one sex. See Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006) (recognizing companies may apply sex-differentiated appearance and grooming policies); Frank, 216 F.3d at 854 ("An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.").

Relying on Carroll and O'Donnell, Rohaly contends PNW's dress policy is facially discriminatory and constitutes disparate treatment because it only required women to purchase and wear a blue blazer. A facially discriminatory policy exists when "on its face [the policy] applies less favorably to one gender." Gerdom, 692 F.2d at 608. If a policy is facially discriminatory, the plaintiff need not present further evidence of discriminatory intent. Id.

In Carroll, the Seventh Circuit held an appearance policy that required only women to wear uniforms while allowing men to wear regular business attire was facially discriminatory. 604 F.2d at 1032-33. The policy allowed men to choose between wearing "business suits or business-type sport jackets and pants and ties," and "leisure suits" with a shirt and tie, but women had to purchase and wear a two-piece uniform. Id. at 1029-30. The court concluded requiring employees of only one sex to wear uniforms constituted facial discrimination. Id. at 1033. Similarly, in O'Donnell, the court followed the Seventh Circuit's reasoning in Carroll to hold "requiring female sales

clerks to wear a smock while allowing male sales clerks to wear a shirt and tie" amounted to facial discrimination. O'Donnell, 656 F. Supp. at 266. And, in Frank, the Ninth Circuit held setting stricter weight requirements for female flight attendants than for male flight attendants constituted facially discriminatory disparate treatment because the sex-differentiated appearance standard imposed unequal burdens on men and women. 216 F.3d at 853-55. The court concluded that on its face, the policy requiring women to conform to lower weight standards than men imposed an unequal burden on women. Id.

On the other hand, in Jespersen, the Ninth Circuit upheld a sex-differentiated appearance and grooming policy that required women to wear makeup but prohibited men from wearing makeup. 444 F.3d at 1109-11. The policy required male and female employees to comply with various sex-differentiated appearance and grooming standards regarding hair length, nail decoration and hygiene, and facial appearance. Id. at 1109. Despite different requirements based on gender, the court concluded that because the policy was equally burdensome for female and male employees, the policy was not facially discriminatory. Id. at 1110-11. In reaching this conclusion, the court noted, "[t]he material issue under our settled law is not whether the policies are different, but whether the policy imposed on the plaintiff creates an 'unequal burden' for the plaintiff's gender." Id. at 1110.

We conclude this case is more like Jespersen than Carroll, O'Donnell, or Frank. Here, unlike in Carroll and O'Donnell, PNW's dress policy prospectively imposes requirements on both men and women. As with Jespersen's makeup requirements, the

blazer requirement is part of a policy that imposes dress standards on both men and women. PNW's new policy required men to purchase and wear polo shirts or denim shirts with the Rainbow logo, and women to wear polo shirts and to purchase and wear a blue blazer.[11] And, unlike the unequal weight requirements in Frank, PNW's policy on its face imposes financial burdens on both sexes. Prospectively, the policy required men to purchase denim shirts with the Rainbow logo. Women had to buy a navy blazer but no longer had to buy the Rainbow denim shirts. Because the policy imposes requirements on both sexes and does not appear to impose unequal burdens on its face, we conclude PNW's dress code policy is not facially discriminatory.

Because the dress policy is not facially discriminatory, Rohaly must establish a prima facie case of discrimination. Healey v. Southwood Psychiatric Hosp., 78 F.2d 128, 131-32 (3d Cir. 1996). To establish a discrimination claim under a disparate treatment theory, the plaintiff must establish: (1) she belongs to a protected class (female), (2) she was treated less favorably in the terms and conditions of her employment than similarly situated employees of the opposite sex, and (3) she engaged in substantially similar work as employees of the opposite sex. Johnson, 80 Wn. App. at 227.[12] If the plaintiff meets her burden of establishing a prima facie case of sex discrimination, the burden shifts and the employer must present legitimate, nondiscriminatory reasons for the policy. Tex. Dep't of Cmty. Affairs v. Burdine, 450

[11] The policy does not appear to prohibit women from wearing denim shirts.

[12] The elements for a prima facie case are not absolute but vary based on different factual situations. Tex. Dep't of Cmty. Affairs at 254; McDonnell Douglas Corp. v. Green, 411 U.S. at 802 (setting the foundation for a prima facie case of discrimination); Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 363, 753 P.2d 517 (1988).

U.S. 248, 252-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If the employer meets this burden of production, the plaintiff must then produce evidence of pretext. McDonnell Douglas Corp., 411 U.S. at 804. At all times, the plaintiff bears the burden of persuasion. Burdine, 450 U.S. at 256; Gerdom, 692 F.2d at 608.

There is no dispute Rohaly is a member of a protected class. She also meets the third prong of the prima facie case – she is a salesperson engaging in retail activities similar to male salespersons. But, construing the facts and reasonable inferences in the light most favorable to Rohaly, we conclude there are genuine issues of material fact regarding the second prong – whether the blazer requirement in fact creates an unequal burden on female employees in the terms and conditions of employment.

Under Price Waterhouse, if Rohaly establishes a prima facie case and PNW meets its burden of production, Leonard's sexist and demeaning comments will be relevant to proving pretext and to rebut PNW's proffered legitimate, nondiscriminatory reasons for firing Rohaly. See Frank, 216 F.3d at 854-55. In Price Waterhouse, a plurality of the Supreme Court held, "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 258. The plurality clarified, "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular

employment decision," but they "can certainly be *evidence* that gender played a part." Id. at 251 (emphasis in original).

Here, Kenneth Rohaly,[13] who managed the Algona store, described Leonard as stating "she wanted women to wear blazers 'to cover up their boobs and to cover . . . . [She then moved her hand along her bottom indicating women should cover that part of their body].'" Similarly, Kelly Rohaly explained Leonard told him "that the 'girls have to wear blazer so their boobs don't hang out.'" Rohaly also claims Leonard told her, "'I feel like women should wear blazers because this is a man's world and to keep up with men, wom[e]n have to be one up on them,'" and that the blouse worn underneath the blazer should not be "too low cut or too tight so that our 'boobies' would not show." As in Price Waterhouse, demeaning sexist remarks are relevant to show gender impermissibly played a part in PNW's decision to fire Rohaly.

Successor Liability

Below, the trial court decided Rohaly did not establish Playground Depot was a successor to PNW under Washington law. The trial court followed Long v. Homes Health Servs., 43 Wn. App. 729, 719 P.2d 176 (1986), and rejected Rohaly's request to apply the federal doctrine of remedial successor liability to her WLAD discrimination claim against Playground Depot.[14]

Rohaly does not challenge the trial court's determination that she did not establish Playground Depot was liable as a successor to PNW under state law.

[13] Kenneth is Michele Rohaly's brother.

[14] The parties agree the federal doctrine applies to Rohaly's discrimination claim under Title VII.

Rohaly's only challenge on appeal is to the court's refusal to adopt the federal doctrine of remedial successor liability.

Under the common state law doctrine and Long, when a corporation transfers its assets to another corporation, the transferee is not liable for the debts and liabilities of the transferee unless, "(1) the purchaser expressly or impliedly agrees to assume liability; (2) the purchase is a de facto merger or consolidation; (3) the purchaser is a mere continuation of the seller; or (4) the transfer of assets is for the fraudulent purpose of escaping liability." Long, 43 Wn. App. at 732.

The federal courts have developed a federal common law successor liability doctrine that applies to discrimination cases under Title VII. Bates v. Pac. Mar. Ass'n, 744 F.2d 705, 708 (9th Cir. 1984). The federal doctrine is rooted in equity and fairness as its primary considerations. Criswell v. Delta Air Lines, 868 F.2d 1093 (9th Cir. 1989). Under the federal doctrine, successor liability attaches to an employer when the plaintiff shows: "(1) the continuity in operations and work force of the successor and predecessor employers, (2) the notice to the successor employer of its predecessor's legal obligation, and (3) the ability of the predecessor to provide adequate relief directly." Bates, 744 F.2d at 709-10.

Because the briefs do not address whether a majority of state courts have adopted the federal doctrine or the ramifications of departing from our established state law, we decline Rohaly's request to abandon the state common law doctrine for successor liability and instead adopt the federal remedial liability doctrine.

CONCLUSION

Although we conclude PNW's dress policy is not facially discriminatory, there are genuine issues of material fact regarding whether the unwritten dress policy treated female employees differently in the terms and conditions of their employment than similarly situated male employees, and whether Rohaly was discriminated against because of her sex. We reverse the trial court's summary judgment dismissal and remand for trial on Rohaly's Title VII sex discrimination claim. On this record, we decline Rohaly's request to adopt the federal doctrine of remedial successor liability and affirm the trial court's decision to follow the state common law doctrine for successor liability and Long.

WE CONCUR:

Appelwick, C.J.

Becker, J.

Schindler, A.C.J.